AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

August 13, 2019

5:15 p.m. – 6:45 p.m.

Council Room – 3rd Floor, N31
Matheson Courthouse
450 S. State St., Salt Lake City, UT

***Light Dinner will be served*

Item	Type	Tab	Presenter
Welcome New Members • Tony Graf • Hon. Richard McKelvie • John Nielson • Jennifer Parrish • Hon. David Williams	Discussion	Tab 1	John Lund
Approval of Minutes • April 30, 2019	Action	Tab 2	John Lund
Final Approval of Committee Website https://www.utcourts.gov/utc/rules-evidence/	Action		Keisa Williams
Summary: Supreme Court Conference	Discussion		John Lund
URE 617. Eyewitness Identification • Final - Approved • Create Standing Subcommittee	Action	Tab 3	John Lund Hon. Linda Jones
URE 1101. Applicability of Rules Returned to Committee for edits	Action	Tab 4	John Lund
URE 512. Victim Communications Declined to adopt. H.J.R.3 Effective. Returned to Committee for reconsideration	Action	Tab 5	John Lund

Queue:

- Representative Ken Ivory (and legislative research)
  - URE 409 – Expressions of Empathy
  - URE 412 – Protecting sexual assault victims who "freeze"
- Ongoing Project: Rule Comments
  - Law student caselaw review
  - Remove comments or make them historical only – put substantive information in the rule itself

2019 Meeting Dates:
October 8, 2019
November 12, 2019

2020 Meeting Dates:
January 14, 2020
February 11, 2020
April 14, 2020
June 9, 2020
October 13, 2020
November 10, 2020

Tab 1

Resumes Confidential

Tab 2

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
Tuesday– April 30, 2019
5:15 p.m.
Council Room

Mr. John Lund, Presiding

MEMBER PRESENT	MEMBERS EXCUSED	STAFF PRESENT	GUESTS PRESENT
Judge Matthew Bates	Adam Alba	Keisa Williams	Jacqueline Carlton
Deborah Bulkeley	Tenielle Brown	Nancy Merrill	(legislative research)
Nicole Salazar-Hall	Matthew Hansen		
Ed Havas	Michalyn Steele		
Chris Hogle	Terry Rooney		
John Lund, Chair	Jacey Skinner		
Judge Linda Jones			
Judge David Mortensen			
Lacey Singleton			
Judge Vernice Trease			
Teresa Welch			
Dallas Young			

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1. Welcome and Approval of Minutes:

Mr. Lund welcomed everyone to the meeting.

Teresa Welch made the following correction to the minutes from the Evidence Advisory Committee meeting on March 19, 2019. Tab 4, Rule 106, paragraph 5, the last sentence should be amended to read: "The word 'fairness' was not used because caselaw has defined 'fairness' as 'necessary to qualify, explain, or place into context the portion already introduced.'"

***Motion:* Judge Mortenson moved to approve the amended minutes from the March 19, 2019 Evidence Advisory meeting. The motion was seconded and carried unanimously.**

2. Administrative Update:

Mr. Lund reviewed current membership terms and noted that there will be several vacancies as of July 1, 2019. He asked Committee members to talk to anyone they think would be a good candidate and encourage them to apply. Judge Trease stated that one discouraging factor in the

past has been the requirement for applicants to write an essay explaining why they want to be on the Committee. She questioned whether a sentence or two might be sufficient. Mr. Lund stated that the Committee has traditionally received 40-50 applications.

Keisa Williams reviewed the following term rules for members; a member cannot serve more than two 4-year terms, however, a chair can serve up to four terms. The court can approve exceptions and the Committee can have up to two emeritus members.

Keisa reported that the Supreme Court wants the Advisory Committees to be more transparent to the public and has asked that meeting materials and minutes be posted on the Court's Website. Ms. Williams presented a mockup of an Evidence Advisory Committee webpage and asked for the Committee's comments and suggestions. In addition, Keisa said she would email a link to the webpage so that Committee members can explore content and functionality and provide feedback.

The Committee discussed the idea of scheduling Evidence Advisory Committee meeting dates one year in advance. After discussion, the Committee agreed to set five meetings a year, with the ability to add or cancel meetings as needed. Meetings will be held the second Tuesday of the month. 2019 meetings will be held August 13, October 8, and November 12. Starting in 2020 and moving forward, the meetings will be scheduled on the second Tuesday of January, February, April, June, October, and November.

3. Victim Communications Subcommittee (URE 512):

The subcommittee was charged with reviewing H.J.R. 3 and H.B. 53, and recommending a draft of URE 512 for consideration by the Committee. Representative Snow was unable to attend the meeting via phone. Judge Bates, Dallas Young, and Deborah Bulkeley discussed their draft, including the following changes:

(a) Definitions. Removed a couple of definitions which became unnecessary based on changes made later in the rule.

(a)(2) Confidential Communication. Slightly amended to make it mirror definitions in the attorney/client privilege rule.

(b) Statement of the privilege. Slightly amended because the original language included a long list of exceptions that don't belong in a rule of evidence. The exceptions weren't matters likely to come up in court. They happen outside of court. In addition, it appeared to be the intent of the legislature that those exceptions were instances in which a victim advocate could make a disclosure without waiving the privilege for purposes of being admissible or inadmissible in court. To address those concerns, the subcommittee added two sentences at the end of (b) referencing Utah Code section 77-38-405(1)(a).

Mr. Lund asked what the reference to 77-38-405(1)(a) accomplishes. Judge Bates clarified that criminal justice victim advocates can disclose (without waiving the privilege) to a prosecutor, parent or guardian of a victim, law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled for a certain purpose, and to the extent allowed by the rules of evidence. The subcommittee's reason for drafting (b) the way they did (disclosure without waiving the privilege) is because it seems that was the intent of the legislature. Looking at (1)(a)(i), in a scenario where every confidential communication must be disclosed to the prosecutor, and if disclosing that communication waives the privilege and makes it admissible in court, you've now negated the privilege. There is no privilege. So it must have been the intent of the legislature that these are situations in which the victim advocate can disclose communications to certain people while keeping the privilege intact. Mr. Havas agreed, stating that otherwise, the exceptions swallow the rule. Judge Bates likes referencing the statute because it allows the legislature to easily amend or expand the exceptions without having to change the rules of evidence.

(c) Who May Claim the Privilege. The substance is the same. Putting them in a list made it easier to read and clarified the intent.

(d) Exceptions. Judge Bates stated that it seems the intent of the rule is to waive or terminate the privilege in the event that a court determines that the evidence must be turned over and used under Brady. The subcommittee was concerned about that kind of limitation and felt that the exception to the privilege should be a little broader than just Brady material. The subcommittee made two big changes:

(d)(1)(A) and (d)(2). The subcommittee created a mechanism for any party in a civil or criminal case to ask the Court to review the communication and then balance the probative value with the adverse effect disclosure would have on the victim or the victim's relationship with the victim advocate. If the Court finds the probative value outweighs that negative effect, then it can order the material to be disclosed and used in a civil or criminal case. Making this provision applicable to both civil and criminal cases supports removal of the distinction between "criminal justice system advocates" and other advocates.

The subcommittee recognizes that the balancing test is created out of whole cloth but they felt it mirrors URE 403. Mr. Young stated that this test clears up the language in H.J.R.3 which used "admissibility" and "disclosure" interchangeably. It wasn't always clear whether the legislature was talking about the admissibility of the evidence vs. just handing it over in the first instance. This amendment fixes that problem by saying no privilege exists, so it is both admissible and disclosable.

(d)(1)(B). Gives prosecutors carte blanche discretion to decide when the communication needs to be disclosed to the defense. Prosecutors already make these determinations all the time

about Brady material and other discovery issues and they work very closely with victim advocates. Giving prosecutors the discretion to make these decisions will avoid a lot of work on the part of the judiciary to hold in camera reviews, especially where the prosecutor decides to disclose, the defense attorney is not going to object, and the judge is not likely to deny the request. So why not just allow the prosecutor to decide when communications may be disclosed.

Mr. Lund expressed a concern about giving prosecutors sole discretion. Judge Trease likes the provision because it makes the prosecutors think twice about not disclosing things that should be disclosed. Things that may not necessarily be Brady material, but probably should be disclosed anyway. Judge Bates posed a hypothetical: I'm a prosecutor and there are notes from the victim advocate in my case file. I think that a couple of things in those notes should be disclosed to the defense because they could be impeachable or exculpatory. If I go file a motion with the court and ask for an in camera review, the defense attorney is certainly not going to object. Now the judge is in the position of trying to determine if the communication is really Brady material, whether they should order that the communication be disclosed, do they want to create an appealable issue, etc. I can't imagine a judge would second guess the prosecutor and not allow disclosure.

Mr. Lund asked about the potential impact on victims. Hypothetically: A victim advocate tells a victim, "I'm your advocate. You can tell me stuff. I'm here to help you. Please share everything with me." Then months down the road all of that information is shared with the prosecutor, and then the prosecutor gives it to defense counsel who represents the alleged offender. What happened to the promise of keeping this person's communications confidential? Mr. Young clarified that disclosures circumventing the privilege would be limited to Brady material. For example, "Oh by the way, I made all that stuff up, he never touched me." Garden variety communications ("I felt horrible when this happened") would not be admissible or disclosable.

The Committee discussed the distinction between criminal justice system victim advocates and other advocates. Judge Bates stated that H.J.R.3 created a very narrow exception only for Brady material. Evidence, testimony, or statements in the possession of a non-government agent are not Brady material and the prosecutor can never be responsible for what's in the possession of a third party. The subcommittee felt that was too narrow. Judge Bates' view is that every time we create a privilege we are sacrificing truth for some other policy reason, for encouraging confidentiality in some other relationship. The subcommittee didn't feel this rule needed to be as strict as an attorney/client or doctor/patient privilege so this proposal intends to strike a balance between the two.

Mr. Young expressed a concern about whether the legislature has the authority to create a rule of evidence under Article 8, Section 4 of the Utah Constitution. That Article seems to reserve the right to create rules out of whole cloth to the judiciary, and the right of the legislature is to amend. Ms. Salazar noted that the separation of powers issue was discussed at the

Governmental Relations Committee meeting and it was hotly contested. There were a number of people who felt H.J.R.3 wasn't an amendment, but rather a full enactment of a new rule. Judge Mortensen asked whether the Constitution states that the legislature can amend "a" rule, or that they can amend "the rules." Ms. Salazar reads it as the ability to amend "a" rule that is already in existence because rulemaking is within the Supreme Court's purview. The legislative committee reviewed *Brown v. Cox*, 387 P.3d 1040, during those discussions.

Mr. Havas stated that *Brown v. Cox* was very clear and adopting this rule ignores the fact that what the legislature is doing runs afoul of the constitutional prohibition. In not addressing that issue, it appears as if the Court is becoming complicit in its own lack of constitutional separation of powers. Mr. Lund suggested that the Committee express this concern to the Supreme Court and note that if the Court is inclined to adopt a rule, the Committee's version is the one they should adopt.

Mr. Lund stated that he doesn't believe it was Representative Snow's intention to wrest power away from the Court, it was more a need to have a rule in place when the bill goes into effect in order to protect victim communications in court proceedings. Mr. Lund recognized and appreciates Representative Snow's willingness to work with the Committee throughout the session and in allowing the Court an opportunity to create its own version of the rule before H.J.R.3 becomes effective.

The Committee suggested the following changes to the subcommittee's proposed Rule 512:

> (a)(2) "Confidential communication" means communication made privately for the purpose of obtaining or receiving ~~victim advocate~~ advocacy services and not intended for further disclosure except to other persons in furtherance of the purpose of the communication."
>
> (b) "A victim ~~communicating with a victim advocate~~ has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing the victim's ~~a~~ confidential communication. However, a victim advocate may disclose the confidential communication under the circumstances described in Utah Code section 77-38-405(1)(a). Such disclose does not waive the privilege."
>
> (c)(2) the guardian or conservator of the victim**,** ~~if~~ unless the guardian or conservator is ~~not~~ the accused; and
>
> (d)(1)(A)(i)(b) ~~the relationship between the victim and the victim advocate; or~~ the provision of advocacy services; or

***<u>Motion:</u>* Chris Hogle made a motion that if the Supreme Court is inclined to adopt a new rule of evidence created by the legislature, the Evidence Advisory Committee recommends they**

adopt the Committee's version of URE 512 as revised today. Dallas Young seconded the motion. The motion passed unanimously.

4. URE 804 Subcommittee:

Lacey Singleton reported on the URE 804 subcommittee's work. She pointed to the recent Bar Journal article (Utah Bar Journal, May/Apr 2019, Volume 32 No. 2) written by Matt Hansen and Blake Hills which discusses their concerns about what the *Goins* decision does in terms of eliminating testimony that could have been used at trial and having witnesses testify multiple times (*State v. Goins*, 2017 UT 61, ¶ 7, 423 P.3d 1236).

Ms. Singleton's concern about the *Goins* decision is that it seems to be contradictory. Since the *Goins* decision, prosecutors have been objecting to everything defense attorneys ask which is even remotely afield of probable cause. Prosecutors are also often going forward with paper prelims using only URE 1102 statements without ever putting on witnesses. Ms. Singleton believes prosecutors engaging in that practice are acting contrary to the concern regarding preservation of testimony for future reference. If you go forward with a prelim using only URE 1102 statements and then a witness disappears, you've got nothing, whereas if a witness was called to testify and defense attorneys are allowed to get into more details during cross examination, there is at least an argument that the testimony is preserved and it could potentially be introduced at trial.

The subcommittee is requesting an opinion from the Evidence Advisory Committee on the Statewide Association of Prosecutors' (SWAP) proposed amendment to remove the language regarding a "similar motive" for cross examination. Ms. Bulkeley stated that keeping the motive requirement in the rule seems to protect the ability to cross examine witnesses because defense attorneys don't have a similar motive when addressing evidence that comes in later. If you take it out then defense attorneys would have concerns about their right to cross examine on issues outside of probable cause. The Committee discussed "similar motive" language in other jurisdictions.

Mr. Lund addressed the proposed amendments to URE 804 and asked what effect those changes would have, especially in criminal cases. Ms. Singleton said it seems, in a criminal case, to limit defense attorneys to only having the opportunity to develop testimony on cross. But it doesn't specify what that means. Currently, defense attorneys can develop testimony on cross at a prelim, but only testimony addressing issues of probable cause. Does this proposed amendment now authorize defense attorneys to address other issues at a prelim related to impeachment, credibility, etc.?

Ms. Bulkeley restated the question at hand: At a preliminary hearing the witness is there, but at a trial the witness is not there. Can the prelim transcript come in at trial? Under current law, the transcript only comes in if the defense attorney had a similar motive in cross examining the

witness at the preliminary hearing as they do in cross examining the witness at trial. So if you take out the "similar motive" language, it seems that much emphasis will be placed on what constitutes an "opportunity" to develop it. Is it enough to give the defense attorney a chance to stand up and ask some questions? If so, that is complicated by whether the prelim limits questions to only those pertaining to probable cause. That highlights the tension between defense and prosecution on this issue.

Mr. Lund posed a hypothetical: A witness is on the stand at the preliminary hearing and there are questions about probable cause that the defense attorney has a right to cross examine them about. The defense attorney might not have a motive, but they have an opportunity. What happens if the witness says something else? For example…Not only did I see this, but then I told 3 other people about it and here's a whole bunch of other information that corroborates my story about how believable I am, etc. Do defense attorneys then not have the ability to cross examine the witness on those additional statements?

Ms. Singleton identified Mr. Lund's hypothetical as the problem defense attorneys are facing now. Prosecutors are objecting to any line of questioning which goes afield of probable cause. Judge Trease stated that defense attorneys will have to walk a fine line of deciding whether to ask certain questions which they know to be objectionable at a prelim. Caselaw says you don't get discovery at a preliminary hearing. Defense lawyers who know the caselaw might not ask certain questions at a prelim that they would want to ask later at trial because they know the law. Just because defense attorneys have the opportunity and choose not to ask the questions, doesn't mean they didn't have a motive. It seems that this proposal might be contrary to what the caselaw says. If the proposal is approved, defense attorneys will have to argue that they didn't have an opportunity.

Ms. Bulkeley asked whether the "similar motive" language needs to be there. Judge Jones asked why the "similar motive" language is there in the civil context. Ms. Singleton said she doesn't understand why SWAP is making a distinction between civil and criminal cases. Judge Bates asked whether the civil/criminal distinction contemplates the scenario in which you take preliminary hearing testimony from a criminal case and try to offer it in a civil case. He assumes they aren't talking about depositions. Judge Jones said it doesn't make sense to have a distinction between criminal and civil cases. Ms. Singleton agreed. She felt it might create confusion and the potential for a higher bar for civil cases than for criminal.

Mr. Lund described a hypothetical: In civil litigation, a company representative gives a deposition in a completely different case, but now opposing counsel (Mr. Havas) wants to offer it in the current case as former testimony to support some piece of evidence about the company. Because Mr. Lund didn't have an opportunity to cross examine the witness, it shouldn't come in. Mr. Havas said arguably he could admit the deposition because a deposition can be used for any lawful purpose and if it was the testimony of a corporate entity such that it's an admission of a party, he can use it for that purpose. He wouldn't have to put the witness on

the stand if the witness was speaking on behalf of the corporation and had the ability to bind the corporation. Judge Jones said Mr. Havas's argument articulates the difference between opportunity and motive. Mr. Havas said it seems even more important to include the "similar motive" language in the criminal context due to the different standards applied at a prelim vs. trial. The focus of those two proceedings is different.

Judge Jones said you don't have the right to confrontation at a prelim, but you do at the trial. It is her impression that the attorneys from the AG's office wanted to eliminate "similar motive" because it was the problematic language in *Goins* and the Supreme Court didn't address the confrontation issue. The Supreme Court said because there isn't a similar motive in a prelim under URE 804, they would address the issue under URE 804. Judge Jones questioned what happens if "similar motive" is taken out. Would the confrontation clause then govern that issue or does it change the result in *Goins*? Mr. Hogle said he doesn't know how much the proposed amendment solves because if you're getting shut down on even straying remotely from the probable cause determination, you've got an awfully good argument that you didn't have the opportunity to develop the testimony to keep that prelim testimony out at trial.

Mr. Havas always read "similar motive" to be similar to the "fully and fairly litigated" concept in res judicata. Ms. Singleton agreed. Ms. Bulkeley feels, in the criminal context, defense and prosecution are split about keeping the "similar motive" language in or taking it out. She asked where that would fall with the civil bar. Mr. Havas said he is unsure. He didn't think it would fall neatly on sides of the "v." because it would depend on who the testimony was offered against. Mr. Lund agreed.

Mr. Young discussed the request from SWAP. He spoke to Ryan Peters. Mr. Peters' concern centered around cases involving gang activity. In many of those cases, witnesses may testify at a prelim but then be threatened and not show up at trial. Prosecutors want to be able to use the witness's prelim testimony. Judge Bates suggested that this proposal may not be the best way for prosecutors to accomplish their goals. It might be better for them to ask the Rules of Criminal Procedure Committee to expand the deposition statutes or create a rule that provides more power in criminal cases to take depositions. Ms. Singleton agreed that changing URE 804 isn't the best remedy. If prosecutors' concern is not to require witnesses to testify or be cross examined more than once, then this proposal seems contrary to that goal. The Committee discussed the current restrictions surrounding depositions in criminal cases, and the possibility of broadening those rights to allow parties more discretion to take depositions. Mr. Young cautioned that such a change may, for defense attorneys, create another avenue of accusations of ineffective assistance if they don't take a deposition and a witness vanishes. A majority of the Committee agreed that exploring the ability to depose a witness to preserve testimony rather than trying to accomplish it during a prelim seems to be a much better remedy.
Mr. Lund asked whether defense attorneys typically make a record in prelims stating that they would like to cross examine the witness on a variety of subjects but are prevented from doing so in a preliminary hearing, and if they do make such a record, are they undercutting the

prosecutors' ability to use the witnesses testimony later? Ms. Singleton stated that defense attorneys do typically make such a record. Judge Jones said if a prosecutor is constantly objecting in a prelim, she will make a statement on the record that she is making a finding right now that defense counsel doesn't have an opportunity or similar motive in cross examination so the testimony will not be admissible at trial. She is unsure if other judges make similar findings. Judge Jones said that there are typically 30 prelims set on one calendar so if the "similar motive" language is stricken and even 5 prelims go forward, they would essentially be conducting mini trials and it would be difficult to get through them all. Judge Trease pointed out the significant difference between a 2-3 day trial and a 30-45 minute prelim and doesn't understand how anyone would think that cross or direct examination at a preliminary hearing translates to "you've had your full opportunity."

Mr. Lund noted that Mr. Hansen has strong feelings about this proposal but wasn't able to attend the meeting today. The Committee determined that Ms. Singleton will speak to Matt Hansen about this discussion and obtain his feedback.

5. Other Business:

The Committee agreed to have another meeting before October 2019.

Next Meeting: August 13, 2019
5:15 p.m.
AOC, Council Room

Tab 3

URE 617

1 **Rule 617. Eyewitness Identification**
2
3 **(a) Definitions**
4
5 **(1) "Eyewitness Identification"** means witness testimony or conduct in a criminal trial
6 that identifies the defendant as the person who committed a charged crime.
7
8 **(2) "Identification Procedure"** means a lineup, photo array, or showup.
9
10 **(3) "Lineup"** means a live presentation of multiple individuals, before an eyewitness, for
11 the purpose of identifying or eliminating a suspect in a crime.
12
13 **(4) "Photo Array"** means the process of showing photographs to an eyewitness for the
14 purpose of identifying or eliminating a suspect in a crime.
15
16 **(5) "Showup"** means the presentation of a single person to an eyewitness in a time frame
17 and setting that is contemporaneous to the crime and is used to confirm or eliminate that
18 person as the perceived perpetrator.
19
20 **(b) Admissibility in General.** In cases where eyewitness identification is contested, the court
21 shall exclude the evidence if the party challenging the evidence shows that a factfinder,
22 considering the factors in this subsection (b), could not reasonably rely on the eyewitness
23 identification. In making this determination, the court may consider, among other relevant
24 factors, expert testimony and other evidence on the following ~~non-exclusive list~~:
25
26 **(1)** Whether the witness had an adequate opportunity to observe the suspect committing
27 the crime;
28
29 **(2)** Whether the witness's level of attention to the suspect committing the crime was
30 impaired because of a weapon or any other distraction;
31
32 **(3)** Whether the witness had the capacity to observe the suspect committing the crime,
33 including the physical and mental acuity to make the observation;
34
35 **(4)** Whether the witness was aware a crime was taking place and whether that awareness
36 affected the witness's ability to perceive, remember, and relate it correctly;
37
38 **(5)** Whether a difference in race or ethnicity between the witness and suspect affected the
39 identification;
40
41 **(6)** The length of time that passed between the witness's original observation and the time
42 the witness identified the suspect;
43
44 **(7)** Any instance in which the witness either identified or failed to identify the suspect
45 and whether this remained consistent thereafter;
46

47 **(8)** Whether the witness was exposed to opinions, photographs, or any other information
48 or influence that may have affected the independence of the witness in making the
49 identification; and
50
51 **(9)** Whether any other aspect of the identification was shown to affect reliability.
52
53 **(c) Identification Procedures.** If an identification procedure was administered to the witness by
54 law enforcement and the procedure is contested, the court must determine whether the
55 identification procedure was unnecessarily suggestive or conducive to mistaken identification. If
56 so, the eyewitness identification must be excluded unless the court, considering the factors in
57 subsection (b) and this subsection (c), finds that there is not a substantial likelihood of
58 misidentification.
59
60 **(1) Photo Array or Lineup Procedures.** To determine whether a photo array or lineup is
61 unnecessarily suggestive or conducive to mistaken identification, the court should
62 consider the following:
63
64 **(A) Double Blind**. Whether law enforcement used double blind procedures in
65 organizing a lineup or photo array for the witness making the identification. If law
66 enforcement did not use double blind procedures, the court should consider the
67 degree to which the witness's identification was the product of another's verbal or
68 physical cues.
69
70 **(B) Instructions to Witness**. Whether, at the beginning of the procedure, law
71 enforcement provided instructions to the witness that
72
73 (i) the person who committed the crime may or may not be in the lineup or
74 depicted in the photos;
75
76 (ii) it is as important to clear a person from suspicion as to identify a
77 wrongdoer;
78
79 (iii) the person in the lineup or depicted in a photo may not appear exactly
80 as he or she did on the date of the incident because features such as weight
81 and head and facial hair may change; and
82
83 (iv) the investigation will continue regardless of whether an identification
84 is made.
85
86 **(C) Selecting Photos or Persons and Recording Procedures**. Whether law
87 enforcement selected persons or photos as follows:
88
89 (i) Law enforcement composed the photo array or lineup in a way to avoid
90 making a suspect noticeably stand out, and it composed the photo array or
91 lineup to include persons who match the witness's description of the
92 perpetrator and who possess features and characteristics that are

93 reasonably similar to each other, such as gender, race, skin color, facial
94 hair, age, and distinctive physical features;
95
96 (ii) Law enforcement composed the photo array or lineup to include the
97 suspected perpetrator and at least five photo fillers or five additional
98 persons;
99
100 (iii) Law enforcement presented individuals in the lineup or displayed
101 photos in the array using the same or sufficiently similar process or
102 formatting;
103
104 (iv) Law enforcement used computer generated arrays where possible; and
105
106 (v) Law enforcement recorded the lineup or photo array procedures.
107
108 **(D) Documenting Witness Response**.
109
110 (i) Whether law enforcement timely asked the witness how certain he or
111 she was of any identification and documented all responses, including
112 initial responses; and
113
114 (ii) Wwhether law enforcement refrained from giving any feedback
115 regarding the identification.
116
117 **(E) Multiple Procedures or Witnesses**.
118
119 (i) Whether or not law enforcement involved the witness in multiple
120 identification procedures wherein the witness viewed the same suspect
121 more than once; and
122
123 (ii) wWhether law enforcement conducted separate identification
124 procedures for each witness, and the suspect was placed in different
125 positions in each separate procedure.
126
127 **(2) Showup Procedures.** To determine whether a showup is unnecessarily suggestive or
128 conducive to mistaken identification, the court should consider the following:
129
130 **(A)** Whether law enforcement documented the witness's description prior to the
131 showup.
132
133 **(B)** Whether law enforcement conducted the showup at a neutral location as
134 opposed to law enforcement headquarters or any other public safety building and
135 whether the suspect was in a patrol car, handcuffed, or physically restrained by
136 police officers.
137

138 **(C)** Whether law enforcement instructed the witness that the person may or may
139 not be the suspect.
140
141 **(D)** Whether, if the showup was conducted with two or more witnesses, law
142 enforcement took steps to ensure that the witnesses were not permitted to
143 communicate with each other regarding the identification of the suspect.
144
145 **(E)** Whether the showup was reasonably necessary to establish probable cause.
146
147 **(F)** Whether law enforcement presented the same suspect to the witness more than
148 once.
149
150 **(G)** Whether the suspect was required to wear clothing worn by the perpetrator or
151 to conform his or her appearance in any way to the perpetrator.
152
153 **(H)** Whether the suspect was required to speak any words uttered by the
154 perpetrator or perform any actions done by the perpetrator.
155
156 **(I)** Whether law enforcement suggested, by any words or actions, that the suspect
157 is the perpetrator.
158
159 **(J)** Whether the witness demonstrated confidence in the identification
160 immediately following the procedure and law enforcement recorded the
161 confidence statement.
162
163 **(3) Other Relevant Circumstances**. In addition to the factors for the procedures
164 described in parts (1) and (2) of this subsection (c), the court may evaluate an
165 identification procedure using any other circumstance that the court determines is
166 relevant.
167
168 **(d) Admissibility of Photographs.** Photographs used in an identification procedure may be
169 admitted in evidence if:
170
171 **(1)** the prosecution has demonstrated a reasonable need for the use;
172
173 **(2)** the photographs are offered in a form that does not imply a prior criminal record; and
174
175 **(3)** the manner of their introduction does not call attention to their source.
176
177 **(e) Expert Testimony.** When the court admits eyewitness identification evidence, it may also
178 receive related expert testimony upon request.
179
180 **(f) Jury Instruction.** When the court admits eyewitness identification evidence, the court may,
181 and shall if requested, instruct the jury consistent with the factors in subsections (b) and (c) and
182 other relevant considerations.
183

184 **2019 Advisory Committee Note**: This rule ensures that when called upon, a trial court will
185 perform a gatekeeping function and will exclude unreliable eyewitness identification evidence in
186 a criminal case. Several organizations, including the Department of Justice and the ABA, have
187 published best practices for eyewitness identification procedures when a witness is asked to
188 identify a perpetrator who is a stranger to the witness. As scientific research advances, other
189 factors in addition to those outlined in Subsection (b) may be considered.
190
191 **Subsection (a)** defines terms commonly used in the eyewitness identification process.
192
193 **Subsection (b)** addresses estimator variables (circumstances at the time of the crime). According
194 to the National Research Council of the National Academies, the most-studied estimator
195 variables include: weapon focus, stress and fear, race bias, exposure, duration, and retention. The
196 literature talks about how stress, fear, and anxiety may affect memory storage and retrieval. The
197 ABA recognizes that high and low levels of stress may harm performance in identifying
198 suspects, while moderate levels may enhance memory performance. A stressed victim may
199 encode information differently and be more affected by stress than a passerby, unless the
200 passerby is unaware that a crime is taking place. In addition, the cross-race effect may impact the
201 accuracy of identifications; and the participation of law enforcement and others may influence a
202 witness's perceptions and memory retrieval. Expert evidence may be necessary to elucidate these
203 factors for the court, and where the evidence is admissible, expert evidence and/or an instruction
204 may further elaborate on the factors for the jury.
205
206 **Subsection (c)(1)** reflects some of the best practices in the context of photo array and lineup
207 procedures, including use of double blind procedures; providing instructions to the witness at the
208 beginning of the procedure; displaying photos or presenting a lineup with individuals who
209 generally fit the witness's description of the suspect and who are sufficiently similar so as not to
210 suggest the suspect to the witness; documenting the procedures, including the witness's
211 responses; and guarding against influencing the witness through use of multiple procedures or
212 when multiple witnesses are involved.
213
214 **Use of double blind procedures**. The literature, including the National Academies of
215 Science report, supports that whenever practical, the person who conducts a lineup or
216 organizes a photo array and all those present (except defense counsel) should be unaware
217 of which person is the suspect through use of double blind procedures. Use of double
218 blind procedures provides assurance that an administrator who is not involved in the
219 investigation does not know what the suspect looks like and is therefore less likely to
220 suggest or confirm that the perpetrator is in the lineup or the photo array. At times,
221 double blind procedures may not be practical. In such cases, the administrator should
222 adopt blinded procedures, such as a "folder shuffle," to prevent him or her from knowing
223 which photo a witness is viewing at a given time and to ensure that he or she cannot see
224 the order or arrangement of the photographs viewed by the witness. Blinded procedures
225 may be necessary to use in smaller agencies with limited resources or in high profile
226 cases where all officers are aware of the suspect's identity. As a practical matter, blinded
227 procedures work only for photo arrays and are not recommended for use in lineups.
228 Lineups must be conducted using double blind procedures.
229

Providing instructions to the witness. The person conducting the lineup or photo array should not disclose or convey to the witness that a suspect is in custody. Rather, the person should read instructions to the witness that are neutral and detached and should allow the witness to ask questions about the instructions before the process begins. The witness should sign and date the instructions. Organizations have published instructions for use in lineup or photo array procedures that may be used by agencies. While a witness is viewing the photo array, the person conducting the procedure should not interrupt the witness or interject.

Displaying photos or presenting a lineup. In selecting fillers or individuals for the photo array or lineup procedure, at least five fillers—or non-suspects—should be used with the suspect photo. Fillers should generally fit the witness's description of the perpetrator as opposed to match a specific suspect's appearance. Fillers should not make the suspect noticeably stand out. Photos should be of similar size with similar background and formatting. They should be numbered sequentially or labeled in a manner that does not reveal identity or the source of the photo, and they should contain no other writing.

Documenting witness responses. Law enforcement should clearly document by video or audio recording a witness's level of confidence verbatim at the time of an initial identification.

Multiple procedures and multiple witnesses. According to the literature, multiple identification procedures create a "commitment effect" in which the witness might recognize a lineup member or photo from a previous procedure, rather than from the crime scene. In addition, when multiple witnesses are involved, a procedure that ensures the suspect is not in the same position for each procedure guards against witnesses influencing one another.

Subsection (c)(2) addresses showup procedures. While some jurisdictions consider showup procedures to be highly suggestive, the procedures may be necessary to law enforcement in assessing eyewitness identification. In that regard, the International Association of Chiefs of Police (IACP) and other organizations recommend that witnesses should not be shown suspects while they are in suggestive settings such as a patrol car, handcuffs, or other physical restraints. Such settings can lead to a prejudicial inference by the witness. Subsection (c)(2) addresses factors to consider in showup procedures. Once law enforcement has probable cause to arrest a suspect, however, a witness should not be allowed to participate in showup proceedings but should participate only in lineup or photo array procedures.

Subsection (c)(3) addresses other factors that may be relevant to the analysis. Those factors may include whether there was no unreasonable delay between the events in question and the identification procedures, among other things.

Subsection (d) addresses the use of photographs at trial that were used by law enforcement in identification procedures.

275 **Subsections (e) and (f)** are included because the National Academies of Science (NAS) report
276 recommends both expert testimony and jury instructions due to the fact that many scientifically
277 established aspects of eyewitness identification memory are counterintuitive and jurors will need
278 assistance in understanding the factors that may affect the accuracy of an identification.
279
280 **Sources**: National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification*
281 (2014), available at https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-
282 eyewitness-identification; U.S. D.O.J., *Eyewitness Identification: Procedures for Conducting*
283 *Photo Arrays* (2017); ABA Statement of Best Practices for Promoting the Accuracy of
284 Eyewitness Identification Procedures (2004); IACP National Law Enforcement Policy Center,
285 *Eyewitness Identification: Model Policy* (2010).
286

Tab 4

URE 1101

RULE 1101. APPLICABILITY OF RULES

(a) Proceedings Generally. These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivisions (c) and (d). They apply generally to civil actions and proceedings, criminal cases and contempt proceedings except those in which the court may act summarily.

(b) Rule of Privilege. The rule with respect to privileges applies at all stages of all actions, cases and proceedings.

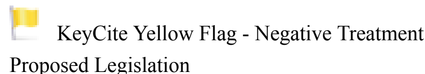
(c) Rules Inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

> (1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.
> (2) Grand Jury. Proceedings before grand juries.
> (3) Miscellaneous Proceedings.
>
> > (A) Proceedings for extradition or rendition;
> > (B) Hearings for sentencing, including restitution hearings;~~or~~
> > (C) Hearings for granting ~~or revoking~~ probation;
> > (D) Proceedings for issuance of warrants for arrest, criminal summonses, and search warrants; and
> > (E) ~~p~~Proceedings with respect to release on bail or otherwise.

(d) Reliable Hearsay in Criminal Preliminary Examinations. In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.

NOTE: In *State v. Weeks*, 61 P.3d 1000, ¶16 (Utah 2002), the Utah Supreme Court relied on rule 1101 to hold that hearsay evidence is admissible in restitution hearings.

Also, Utah Code section 77-18-1(12)(d)(iii) deals with revoking probation. It states that in a probation revocation proceeding, "[t]he persons who have given adverse information on which the allegations are based *shall be presented as witnesses* subject to questioning by the defendant unless the court for good cause otherwise orders."


KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Utah Code Annotated
Title 77. Utah Code of Criminal Procedure
Chapter 18. The Judgment

U.C.A. 1953 § 77-18-1

§ 77-18-1. Suspension of sentence--Pleas held in abeyance--Probation--Supervision--Presentence investigation--Standards--Confidentiality--Terms and conditions--Termination, revocation, modification, or extension--Hearings--Electronic monitoring

Effective: May 14, 2019
Currentness

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2)(a) On a plea of guilty, guilty with a mental illness, no contest, or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the sentence and place the defendant:

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation under the supervision of an agency of local government or with a private organization; or

(iii) on court probation under the jurisdiction of the sentencing court.

(b)(i) The legal custody of all probationers under the supervision of the department is with the department.

(ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.

(iii) The court has continuing jurisdiction over all probationers.

(iv) Court probation may include an administrative level of services, including notification to the court of scheduled periodic reviews of the probationer's compliance with conditions.

(c) Supervised probation services provided by the department, an agency of local government, or a private organization shall specifically address the offender's risk of reoffending as identified by a validated risk and needs screening or assessment.

(3)(a) The department shall establish supervision and presentence investigation standards for all individuals referred to the department based on:

(i) the type of offense;

(ii) the results of a risk and needs assessment;

(iii) the demand for services;

(iv) the availability of agency resources;

(v) public safety; and

(vi) other criteria established by the department to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.

(c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

(4) Notwithstanding other provisions of law, the department is not required to supervise the probation of an individual convicted of a class B or C misdemeanor or an infraction or to conduct presentence investigation reports on a class C misdemeanor or infraction. However, the department may supervise the probation of a class B misdemeanant in accordance with department standards.

(5)(a) Before the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.

(b) The presentence investigation report shall include:

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(i) a victim impact statement according to guidelines set in Section 77-38a-203 describing the effect of the crime on the victim and the victim's family;

(ii) a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Chapter 38a, Crime Victims Restitution Act;

(iii) findings from any screening and any assessment of the offender conducted under Section 77-18-1.1;

(iv) recommendations for treatment of the offender; and

(v) the number of days since the commission of the offense that the offender has spent in the custody of the jail and the number of days, if any, the offender was released to a supervised release or alternative incarceration program under Section 17-22-5.5.

(c) The contents of the presentence investigation report are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.

(6)(a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional 10 working days to resolve the alleged inaccuracies of the report with the department. If after 10 working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

(b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the court may require that a defendant perform any or all of the following:

(a) provide for the support of others for whose support the defendant is legally liable;

(b) participate in available treatment programs, including any treatment program in which the defendant is currently participating, if the program is acceptable to the court;

(c) if on probation for a felony offense, serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;

(d) serve a term of home confinement, which may include the use of electronic monitoring;

(e) participate in compensatory service restitution programs, including the compensatory service program provided in Section 76-6-107.1;

(f) pay for the costs of investigation, probation, and treatment services;

(g) make restitution or reparation to the victim or victims with interest in accordance with Chapter 38a, Crime Victims Restitution Act; and

(h) comply with other terms and conditions the court considers appropriate to ensure public safety or increase a defendant's likelihood of success on probation.

(9) The department shall collect and disburse the accounts receivable as defined by Section 77-32a-101, with interest and any other costs assessed under Section 64-13-21 during:

(a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and

(b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection (10).

(10)(a)(i) Except as provided in Subsection (10)(a)(ii), probation of an individual placed on probation after December 31, 2018:

(A) may not exceed the individual's maximum sentence;

(B) shall be for a period of time that is in accordance with the supervision length guidelines established by the Utah Sentencing Commission under Section 63M-7-404, to the extent the guidelines are consistent with the requirements of the law; and

(C) shall be terminated in accordance with the supervision length guidelines established by the Utah Sentencing Commission under Section 63M-7-404, to the extent the guidelines are consistent with the requirements of the law.

(ii) Probation of an individual placed on probation after December 31, 2018, whose maximum sentence is one year or less may not exceed 36 months.

(iii) Probation of an individual placed on probation on or after October 1, 2015, but before January 1, 2019, may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony

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or class A misdemeanor cases, 12 months in cases of class B or C misdemeanors or infractions, or as allowed pursuant to Section 64-13-21 regarding earned credits.

(b)(i) If, upon expiration or termination of the probation period under Subsection (10)(a), there remains an unpaid balance upon the accounts receivable as defined in Section 77-32a-101 , the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable. If the court retains jurisdiction for this limited purpose, the court may order the defendant to pay to the court the costs associated with continued probation under this Subsection (10).

(ii) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.

(iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why the defendant's failure to pay should not be treated as contempt of court.

(c)(i) The department shall notify the court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation is being requested by the department or will occur by law.

(ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

(11)(a)(i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(iii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation constitutes service of time toward a term of incarceration imposed as a result of the revocation of probation or a graduated sanction imposed under Section 63M-7-404.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12)(a)(i) Probation may be modified as is consistent with the supervision length guidelines and the graduated sanctions and incentives developed by the Utah Sentencing Commission under Section 63M-7-404.

(ii) The length of probation may not be extended, except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

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(iii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b)(i) Upon the filing of an affidavit, or an unsworn written declaration executed in substantial compliance with Section 78B-5-705, alleging with particularity facts asserted to constitute violation of the conditions of probation, the court shall determine if the affidavit or unsworn written declaration establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for the defendant's arrest or a copy of the affidavit or unsworn written declaration and an order to show cause why the defendant's probation should not be revoked, modified, or extended.

(c)(i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed if the defendant is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d)(i) At the hearing, the defendant shall admit or deny the allegations of the affidavit or unsworn written declaration.

(ii) If the defendant denies the allegations of the affidavit or unsworn written declaration, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in the defendant's own behalf, and present evidence.

(e)(i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or reinstated for all or a portion of the original term of probation.

(iii)(A) Except as provided in Subsection (10)(a)(ii), the court may not require a defendant to remain on probation for a period of time that exceeds the length of the defendant's maximum sentence.

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(B) Except as provided in Subsection (10)(a)(ii), if a defendant's probation is revoked and later reinstated, the total time of all periods of probation the defendant serves, relating to the same sentence, may not exceed the defendant's maximum sentence.

(iv) If a period of incarceration is imposed for a violation, the defendant shall be sentenced within the guidelines established by the Utah Sentencing Commission pursuant to Subsection 63M-7-404(4), unless the judge determines that:

(A) the defendant needs substance abuse or mental health treatment, as determined by a validated risk and needs screening and assessment, that warrants treatment services that are immediately available in the community; or

(B) the sentence previously imposed shall be executed.

(v) If the defendant had, prior to the imposition of a term of incarceration or the execution of the previously imposed sentence under this Subsection (12), served time in jail as a condition of probation or due to a violation of probation under Subsection (12)(e)(iv), the time the probationer served in jail constitutes service of time toward the sentence previously imposed.

(13) The court may order the defendant to commit the defendant to the custody of the Division of Substance Abuse and Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or the superintendent's designee has certified to the court that:

(a) the defendant is appropriate for and can benefit from treatment at the state hospital;

(b) treatment space at the hospital is available for the defendant; and

(c) individuals described in Subsection 62A-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).

(14) Presentence investigation reports are classified protected in accordance with Title 63G, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63G-2-403 and 63G-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:

(a) ordered by the court pursuant to Subsection 63G-2-202(7);

(b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;

(c) requested by the Board of Pardons and Parole;

(d) requested by the subject of the presentence investigation report or the subject's authorized representative;

(e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household; or

(f) requested by a sex offender treatment provider who is certified to provide treatment under the program established in Subsection 64-13-25(3) and who, at the time of the request:

(i) is providing sex offender treatment to the offender who is the subject of the presentence investigation report; and

(ii) provides written assurance to the department that the report:

(A) is necessary for the treatment of the offender;

(B) will be used solely for the treatment of the offender; and

(C) will not be disclosed to an individual or entity other than the offender.

(15)(a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76-3-406 and 76-5-406.5.

(b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (16).

(16)(a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.

(b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.

(c) The electronic monitoring device shall be used under conditions which require:

(i) the defendant to wear an electronic monitoring device at all times; and

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(ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.

(d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:

(i) place the defendant on probation under the supervision of the Department of Corrections;

(ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and

(iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

(e) The department shall pay the costs of home confinement through electronic monitoring only for an individual who is determined to be indigent by the court.

(f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.

Credits

Laws 1980, c. 15, § 2; Laws 1981, c. 59, § 2; Laws 1982, c. 9, § 1; Laws 1983, c. 47, § 1; Laws 1983, c. 68, § 1; Laws 1983, c. 85, § 2; Laws 1984, c. 20, § 1; Laws 1985, c. 212, § 17; Laws 1985, c. 229, § 1; Laws 1987, c. 114, § 1; Laws 1989, c. 226, § 1; Laws 1990, c. 134, § 2; Laws 1991, c. 66, § 5; Laws 1991, c. 206, § 6; Laws 1992, c. 14, § 3; Laws 1993, c. 82, § 7; Laws 1993, c. 220, § 3; Laws 1994, c. 13, § 24; Laws 1994, c. 198, § 1; Laws 1994, c. 230, § 1; Laws 1995, c. 20, § 146, eff. May 1, 1995; Laws 1995, c. 117, § 2, eff. May 1, 1995; Laws 1995, c. 184, § 1, eff. May 1, 1995; Laws 1995, c. 301, § 3, eff. May 1, 1995; Laws 1995, c. 337, § 11, eff. May 1, 1995; Laws 1995, c. 352, § 6, eff. May 1, 1995; Laws 1996, c. 79, § 103, eff. April 29, 1996; Laws 1997, c. 390, § 2, eff. May 5, 1997; Laws 1998, c. 94, § 10, eff. May 4, 1998; Laws 1999, c. 279, § 8, eff. May 3, 1999; Laws 1999, c. 287, § 7, eff. May 3, 1999; Laws 2001, c. 137, § 1, eff. April 30, 2001; Laws 2002, c. 35, § 7, eff. May 6, 2002; Laws 2002, 5th Sp.Sess., c. 8, § 137, eff. Sept. 8, 2002; Laws 2003, c. 290, § 3, eff. May 5, 2003; Laws 2005, 1st Sp.Sess., c. 14, § 3, eff. July 1, 2005; Laws 2007, c. 218, § 3, eff. July 1, 2007; Laws 2008, c. 3, § 252, eff. Feb. 7, 2008; Laws 2008, c. 382, § 2193, eff. May 5, 2008; Laws 2009, c. 81, § 3, eff. May 12, 2009; Laws 2011, c. 366, § 176, eff. May 10, 2011; Laws 2014, c. 120, § 3, eff. May 13, 2014; Laws 2014, c. 170, § 1, eff. May 13, 2014; Laws 2015, c. 412, § 205, eff. Oct. 1, 2015; Laws 2015, c. 413, § 1, eff. May 12, 2015; Laws 2016, 3rd Sp.Sess., c. 4, § 1, eff. July 17, 2016; Laws 2017, c. 304, § 3, eff. May 9, 2017; Laws 2018, c. 334, § 9, eff. May 8, 2018; Laws 2019, c. 28, § 1, eff. May 14, 2019; Laws 2019, c. 429, § 1, eff. May 14, 2019.

Chapters 1 to 21 appear in this volume.

Notes of Decisions (265)

U.C.A. 1953 § 77-18-1, UT ST § 77-18-1
Current through 2019 General Session.

End of Document

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Tab 5

URE 512

Rule 512. Victim communications.

(a) Definitions.

(a)(1) "Advocacy services" means the same as that term is defined in UCA § 77-38-403.

(a)(2) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services as defined in UCA § 77-38-403.

(a)(3) "Criminal justice system victim advocate" means the same as that term is defined in UCA § 77-38-403.

(a)(4) "Health care provider" means the same as that term is defined in UCA § 78B-3-403.

(a)(5) "Mental health therapist" means the same as that term is defined in UCA § 58-60-102.

(a)(6) "Victim" means an individual defined as a victim in UCA § 77-38-403.

(a)(7) "Victim advocate" means the same as that term is defined in UCA § 77-38-403.

(b) Statement of the Privilege. A victim communicating with a victim advocate has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing a confidential communication.

(c) Who May Claim the Privilege. The privilege may be claimed by the victim engaged in a confidential communication, or the guardian or conservator of the victim engaged in a confidential communication if the guardian or conservator is not the accused. An individual who is a victim advocate at the time of a confidential communication is presumed to have authority during the life of the victim to claim the privilege on behalf of the victim.

(d) Exceptions. An exception to the privilege exists in the following circumstances:

(d)(1) when the victim, or the victim's guardian or conservator if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:

(d)(1)(A) the specific confidential communication subject to disclosure;

(d)(1)(B) the limited purpose of the disclosure; and

(d)(1)(C) the name of the individual or party to which the specific confidential communication may be disclosed;

(d)(2) when the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;

(d)(3) when the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;

(d)(4) when the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;

(d)(5) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate may disclose the confidential communication to a parent or guardian if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for

Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency for the purpose of providing advocacy services;

(d)(6) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405;

(d)(7) if the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:

(d)(7)(A) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or

(d)(7)(B) the confidential communication is exculpatory evidence, including impeachment evidence.

Effective July 31, 2019, pursuant to 2019 UT H.J.R. 3 “Joint Resolution Adopting Privilege Under Rules of Evidence.”

Rule 512. Victim Communications.

(a) Definitions.

(1) "Advocacy services" means the same as that term is defined in Utah Code section 77-38-403.

(2) "Confidential communication" means communication made privately for the purpose of obtaining or receiving advocacy services and not intended for further disclosure except to other persons in furtherance of the purpose of the communication.

(3) "Victim" means an individual defined as a victim in Utah Code section 77-38-403.

(4) "Victim advocate" means the same as that term is defined in Utah Code section 77-38-403.

(b) Statement of the Privilege. A victim has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing the victim's confidential communication. However, a victim advocate may disclose the confidential communication under the circumstances described in Utah Code section 77-38-405(1)(a). Such disclosure does not waive the privilege.

(c) Who May Claim the Privilege. The privilege may be claimed by:

(1) the victim;

(2) the guardian or conservator of the victim, unless the guardian or conservator is the accused; and

(3) the victim advocate during the life of the victim.

(d) Exceptions.

(1) No privilege exists under paragraph (b) if

(A) a court reviews the confidential communication in camera and determines that:

(i) the probative value of the confidential communication substantially outweighs the adverse effect of the disclosure of the confidential communication on

(a) the victim; or

(b) the provision of advocacy services; or

(ii) in a criminal case, the confidential communication is exculpatory evidence or impeachment evidence; or

(B) a prosecutor determines that the confidential communication must be disclosed to a defendant in a criminal action.

(2) A request for a hearing and in camera review under paragraph (d)(1)(A) may be made by any party by motion. The court shall give all parties and the victim notice of any hearing and an opportunity to be heard.

1 **VICTIM COMMUNICATIONS AMENDMENTS**

2 2019 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: V. Lowry Snow**

5 Senate Sponsor: Todd Weiler

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7 **LONG TITLE**

8 **General Description:**

9 This bill enacts provisions related to victim communications.

10 **Highlighted Provisions:**

11 This bill:

12 ▸ enacts the Privileged Communications with Victim Advocates Act, including:

13 • providing a purpose statement;

14 • defining terms;

15 • outlining the scope of the part;

16 • providing a privilege for confidential communications;

17 • addressing government records; and

18 • requiring certain notices;

19 ▸ addresses examination of a victim advocate; and

20 ▸ makes technical changes.

21 **Money Appropriated in this Bill:**

22 None

23 **Other Special Clauses:**

24 None

25 **Utah Code Sections Affected:**

26 AMENDS:

27 **78B-1-137**, as renumbered and amended by Laws of Utah 2008, Chapter 3

28 ENACTS:

29 **77-38-401**, Utah Code Annotated 1953

30 77-38-402, Utah Code Annotated 1953
31 77-38-403, Utah Code Annotated 1953
32 77-38-404, Utah Code Annotated 1953
33 77-38-405, Utah Code Annotated 1953
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35 *Be it enacted by the Legislature of the state of Utah:*
36 Section 1. Section **77-38-401** is enacted to read:
37 **Part 4. Privileged Communications with Victim Advocates Act.**
38 **77-38-401. Title.**
39 This part is known as the "Privileged Communications with Victim Advocates Act."
40 Section 2. Section **77-38-402** is enacted to read:
41 **77-38-402. Purpose.**
42 It is the purpose of this part to enhance and promote the mental, physical, and emotional
43 recovery of victims by restricting the circumstances under which a confidential communication
44 with the victim may be disclosed.
45 Section 3. Section **77-38-403** is enacted to read:
46 **77-38-403. Definitions.**
47 As used in this part:
48 (1) "Advocacy services" means assistance provided that supports, supplements,
49 intervenes, or links a victim or a victim's family with appropriate resources and services to
50 address the wide range of potential impacts of being victimized.
51 (2) "Advocacy services provider" means an entity that has the primary focus of
52 providing advocacy services in general or with specialization to a specific crime type or
53 specific type of victimization.
54 (3) "Confidential communication" means a communication that is intended to be
55 confidential between a victim and a victim advocate for the purpose of obtaining advocacy
56 services.
57 (4) "Criminal justice system victim advocate" means an individual who:

58 (a) is employed or authorized to volunteer by a government agency that possesses a
59 role or responsibility within the criminal justice system;
60 (b) has as a primary responsibility addressing the mental, physical, or emotional
61 recovery of victims;
62 (c) completes a minimum 40 hours of trauma-informed training:
63 (i) in crisis response, the effects of crime and trauma on victims, victim advocacy
64 services and ethics, informed consent, and this part regarding privileged confidential
65 communication; and
66 (ii) that have been approved or provided by the Utah Office for Victims of Crime; and
67 (d) is under the supervision of the director or director's designee of the government
68 agency.
69 (5) "Health care provider" means the same as that term is defined in Section
70 78B-3-403.
71 (6) "Mental health therapist" means the same as that term is defined in Section
72 58-60-102.
73 (7) "Nongovernment organization victim advocate" means an individual who:
74 (a) is employed or authorized to volunteer by an nongovernment organization advocacy
75 services provider;
76 (b) has as a primary responsibility addressing the mental, physical, or emotional
77 recovery of victims;
78 (c) has a minimum 40 hours of trauma-informed training:
79 (i) in assisting victims specific to the specialization or focus of the nongovernment
80 organization advocacy services provider and includes this part regarding privileged confidential
81 communication; and
82 (ii) (A) that have been approved or provided by the Utah Office for Victims of Crime;
83 or
84 (B) that meets other minimally equivalent standards set forth by the nongovernment
85 organization advocacy services provider; and

86 (d) is under the supervision of the director or the director's designee of the
87 nongovernment organization advocacy services provider.
88 (8) "Record" means a book, letter, document, paper, map, plan, photograph, file, card,
89 tape, recording, electronic data, or other documentary material regardless of physical form or
90 characteristics.
91 (9) "Victim" means:
92 (a) a "victim of a crime" as defined in Section 77-38-2;
93 (b) an individual who is a victim of domestic violence as defined in Section 77-36-1; or
94 (c) an individual who is a victim of dating violence as defined in Section 78B-7-402.
95 (10) "Victim advocate" means:
96 (a) a criminal justice system victim advocate;
97 (b) a nongovernment organization victim advocate; or
98 (c) an individual who is employed or authorized to volunteer by a public or private
99 entity and is designated by the Utah Office for Victims of Crime as having the specific purpose
100 of providing advocacy services to or for the clients of the public or private entity.
101 (d) "Victim advocate" does not include an employee of the Utah Office for Victims of
102 Crime.
103 Section 4. Section **77-38-404** is enacted to read:
104 **77-38-404. Scope of part.**
105 This part governs the disclosure of a confidential communication to a victim advocate,
106 except that:
107 (1) if Title 53B, Chapter 28, Part 2, Confidential Communications for Institutional
108 Advocacy Services Act, applies, that part governs; and
109 (2) if Part 2, Confidential Communications for Sexual Assault Act, applies, that part
110 governs.
111 Section 5. Section **77-38-405** is enacted to read:
112 **77-38-405. Disclosure of a communication given to a victim advocate.**
113 (1) (a) A victim advocate may not disclose a confidential communication with a

114 victim, including a confidential communication in a group therapy session, except:
115 (i) that a criminal justice system victim advocate shall provide the confidential
116 communication to a prosecutor who is responsible for determining whether the confidential
117 communication is exculpatory or goes to the credibility of a witness;
118 (ii) that a criminal justice system victim advocate may provide the confidential
119 communication to a parent or guardian of a victim if the victim is a minor and the parent or
120 guardian is not the accused, or a law enforcement officer, health care provider, mental health
121 therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of
122 Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or a
123 law enforcement agency for the purpose of providing advocacy services; or
124 (iii) to the extent allowed by the Utah Rules of Evidence.
125 (b) If a prosecutor determines that the confidential communication is exculpatory or
126 goes to the credibility of a witness, after the court notifies the victim and the defense attorney
127 of the opportunity to be heard at an in camera review, the prosecutor will present the
128 confidential communication to the victim, defense attorney, and the court for in camera review
129 in accordance with the Utah Rules of Evidence.
130 (2) A record that contains information from a confidential communication between a
131 victim advocate and a victim may not be disclosed under Title 63G, Chapter 2, Government
132 Records Access and Management Act, to the extent that it includes the information about the
133 confidential communication.
134 (3) A criminal justice system victim advocate, as soon as reasonably possible, shall
135 notify a victim, or a parent or guardian of the victim if the victim is a minor and the parent or
136 guardian is not the accused:
137 (a) whether a confidential communication with the criminal justice system victim
138 advocate will be disclosed to a prosecutor and whether a statement relating to the incident that
139 forms the basis for criminal charges or goes to the credibility of a witness will also be disclosed
140 to the defense attorney; and
141 (b) of the name, location, and contact information of one or more nongovernment

142 organization advocacy services providers specializing in the victim's service needs, when a
143 nongovernment organization advocacy services provider exists and is known to the criminal
144 justice system victim advocate.
145 Section 6. Section **78B-1-137** is amended to read:
146 **78B-1-137. Witnesses -- Privileged communications.**
147 There are particular relations in which it is the policy of the law to encourage
148 confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in
149 the following cases:
150 (1) (a) Neither a wife nor a husband may either during the marriage or afterwards be,
151 without the consent of the other, examined as to any communication made by one to the other
152 during the marriage.
153 (b) This exception does not apply:
154 (i) to a civil action or proceeding by one spouse against the other;
155 (ii) to a criminal action or proceeding for a crime committed by one spouse against the
156 other;
157 (iii) to the crime of deserting or neglecting to support a spouse or child;
158 (iv) to any civil or criminal proceeding for abuse or neglect committed against the child
159 of either spouse; or
160 (v) if otherwise specifically provided by law.
161 (2) An attorney cannot, without the consent of the client, be examined as to any
162 communication made by the client to the attorney or any advice given regarding the
163 communication in the course of the professional employment. An attorney's secretary,
164 stenographer, or clerk cannot be examined, without the consent of the attorney, concerning any
165 fact, the knowledge of which has been acquired as an employee.
166 (3) A member of the clergy or priest cannot, without the consent of the person making
167 the confession, be examined as to any confession made to either of them in their professional
168 character in the course of discipline enjoined by the church to which they belong.
169 (4) A physician or surgeon cannot, without the consent of the patient, be examined in a

170 civil action as to any information acquired in attending the patient which was necessary to
171 enable the physician or surgeon to prescribe or act for the patient. However, this privilege shall
172 be waived by the patient in an action in which the patient places the patient's medical condition
173 at issue as an element or factor of the claim or defense. Under those circumstances, a physician
174 or surgeon who has prescribed for or treated that patient for the medical condition at issue may
175 provide information, interviews, reports, records, statements, memoranda, or other data relating
176 to the patient's medical condition and treatment which are placed at issue.
177 (5) A public officer cannot be examined as to communications made in official
178 confidence when the public interests would suffer by the disclosure.
179 (6) (a) A sexual assault counselor as defined in Section 77-38-203 cannot, without the
180 consent of the victim, be examined in a civil or criminal proceeding as to any confidential
181 communication as defined in Section 77-38-203 made by the victim.
182 (b) A victim advocate as defined in Section 77-38-403 may not, without the written
183 consent of the victim, or the victim's guardian or conservator if the guardian or conservator is
184 not the accused, be examined in a civil or criminal proceeding as to a confidential
185 communication, as defined in Section 77-38-403, unless the victim advocate is a criminal
186 justice system victim advocate, as defined in Section 77-38-403, and is examined in camera by
187 a court to determine whether the confidential communication is privileged.